

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL LEROY WITT,
Petitioner.

Nos. 2 CA-CR 2015-0325-PR and 2 CA-CR 2016-0145-PR
(Consolidated)
Filed August 8, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petitions for Review from the Superior Court in Cochise County
No. S0200CR200900021
The Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Michael LeRoy Witt, Florence
In Propria Persona

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 Michael Witt seeks review of the trial court's orders denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those orders unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Witt has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Witt was convicted of possession of methamphetamine, marijuana, and drug paraphernalia and sentenced to concurrent prison terms, the longest of which was ten years. We affirmed his convictions and sentences on appeal. *State v. Witt*, No. 2 CA-CR 2011-0320 (Ariz. App. Nov. 30, 2012) (mem. decision).

¶3 Witt sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but found no colorable claims to raise in a Rule 32 proceeding. Witt filed a pro se petition claiming: (1) his sentence could not be "enhanced" pursuant to A.R.S. § 13-708(C)¹ because he was entitled to a jury finding that he had committed his offenses while on release for a felony offense, and his trial and appellate counsel were ineffective

¹Section 13-708(C) provides that a person who commits a felony offense "while the person is on probation for a conviction of a felony offense or parole, work furlough, community supervision or any other release or escape from confinement for conviction of a felony offense" shall, inter alia, "be sentenced to a term of not less than the presumptive sentence authorized for the offense."

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for failing to raise that issue; (2) his trial counsel failed to advise him that he would receive at least a presumptive prison term because he had committed the crime while on release, causing him to reject a favorable plea offer; and (3) the trial court was biased against him, and his appellate counsel was ineffective for failing to raise on appeal the denial of his motion for change of judge. The trial court summarily denied Witt's first and third claims, but determined he was entitled to an evidentiary hearing on his claim that counsel had inadequately advised him about the state's plea offer. After that hearing, the court denied relief. These consolidated petitions for review followed.²

¶4 On review, Witt reasserts his claims. He does not, however, identify any legal or factual error in the trial court's rejection of those claims. And we have reviewed the record, Witt's petition for post-conviction relief, and the court's rulings and conclude the court clearly identified, thoroughly addressed, and correctly resolved the merits of Witt's claims.³ Moreover, the court

²The trial court extended the due date for Witt's petition because of delays in his receipt of the court's order denying relief as well as delays in his receipt of the transcripts of the evidentiary hearing. In our case number, 2 CA-CR 2015-0325-PR, this court dismissed Witt's first petition for review as untimely because we were not made aware of the extension. After our mandate issued, Witt sought relief in the trial court, which granted his motion to file a "delayed" petition for review, and Witt then filed a second petition for review in this case number. The proper procedure for Witt to obtain review of his petition would have been to notify this court of the order extending the due date. *See* Ariz. R. Crim. P. 31.18, 32.9(c), (g). But, in our discretion, we have vacated our mandate in 2 CA-CR 2015-0325-PR and consolidated that case number with this one. We will consider the arguments raised in both of Witt's petitions for review.

³The trial court was correct that none of the cases cited by Witt support his claim that the imposition of presumptive sentences pursuant to § 13-708(C) was improper. We note, however, that the United States Supreme Court determined in *Alleyne v. United States*,

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ruled in a manner sufficient to permit this or any other court to conduct a meaningful review. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Accordingly, no purpose would be served by repeating the court’s analysis, and we instead adopt it. *See id.*

¶5 Witt also argues in his petition for review that his trial counsel was ineffective for failing “to submit any motion for [a] Rule 11[, Ariz. R. Crim. P.,] evaluation.” But he did not raise this claim below and, accordingly, we do not address it on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to address issue not presented first to trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (Rule 32 review limited to “issues . . . decided by the trial court”). For the same reason, we do not address his argument that trial counsel should have sought to “suppress” evidence that he had committed his offenses while on release.

¶6 Although we grant review, we deny relief.

___ U.S. ___, ___, 133 S. Ct. 2151, 2158 (2013), that a fact increasing the mandatory minimum penalty for an offense must be submitted to a jury. *See also State v. Lizardi*, 234 Ariz. 501, ¶¶ 12-13, 323 P.3d 1152, 1155-56 (App. 2014) (applying *Alleyne* to § 13-708(C)). Witt does not assert *Alleyne* or *Lizardi* constitutes a significant change in the law or otherwise applies to his sentences. *See* Ariz. R. Crim. P. 32.1(g). Nor has he argued that he was not on felony probation at the time of these offenses or that a jury could have found differently.